PUERTO RICO'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY AND THE FINANCIAL OVERSIGHT BOARD

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Abstract

By virtue of PROMESA, the Financial Oversight Board exercises almost unfettered power over Puerto Rico. Yet, when Puerto Rican's came to federal court with claims of transparency, in the form of injunctive relief, the Board raised Puerto Rico's Eleventh Amendment immunity to stop them. Specifically, they sought access to documents relating to the Financial Oversight Board, its appointments and the way it functions, under the Puerto Rico's constitutional right to access public documents. Though this defense was denied, the court did not express whether, in absence of congressional abrogation, the Board and, even more importanly, Puerto Rico have this immunity. Given the purposes of the Eleventh Amendment immunity, and the dual-sovereignty test, it is clear that Puerto Rico does not have this immunity and the existence of the Board, along with its attempt to raise the immunity, are clear indicators of that fact. Nonetheless, if it did, the Board would not be able to raise it as a defense, because it would defeat the purpose of the immunity.

Resumen

En virtud de PROMESA, la Junta de Supervisión Fiscal ejerce un poder casi ilimitado sobre Puerto Rico. Sin embargo, cuando los puertorriqueños acudieron al tribunal federal con reclamos de transparencia, la Junta levantó como defensa la inmunidad de la Enmienda XI de Puerto Rico para detenerlos. Específicamente, buscaban acceso a documentos relacionados a la Junta de Supervisión Fiscal, sus nombramientos y la manera que funcionaría, al amparo del derecho constitucional al acceso a documentos públicos reconocido en

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Puerto Rico. A pesar de que el tribunal denegó esta defensa, el tribunal no se expresó sobre si, en ausencia de abrogación por el Congreso, la Junta y, más importante aún, Puerto Rico gozaran de esa inmunidad. Debido al propósito de la inmunidad contemplada en la Enmienda XI, y el examen de soberanía dual, es evidente que Puerto Rico no tiene esta inmunidad. De hecho, la existencia de la Junta, en conjunto a su intento de levantar como defensa la inmunidad, son indicios claros de ello. Sin embargo, de tenerla, la Junta no podría levantarla, puesto que hacerlo derrota el propósito de la inmunidad.

I. Introduction

In 2016, Congress passed the *Puerto Rico Oversight, Management, and Economic Stability Act* (hereinafter, *PROMESA*).[1] To attend Puerto Rico's dire financial crisis, PROMESA established a Financial Oversight and Management Board for Puerto Rico (hereinafter, the *Board*).[2] The Board was created in a haphazard manner and inserted into Puerto Rico's governmental structure without any consideration for chaotic consequences of that decision.[3] Thus, after PROMESA went into effect, many questions arose regarding the limits

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[1] Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C.A. §§ 2101-2241 (2016).

[2] 48 U.S.C.A. § 2121(b)(1) ("A Financial Oversight and Management Board is hereby established for Puerto Rico.").

[3] *See* 162 CONG. REC. S4693 (daily ed. June 29, 2016)(statement of Sen. Udall)("Mr. President, once again, Congress has responded at the last possible moment to a dire issue–in this case, the debt crisis in Puerto Rico. Friday, July 1, is a critical deadline for the island Commonwealth, the date when Puerto Rico must repay $1.9 billion in debt services that it has repeatedly stated that it is unable to pay."); (statement of Sen. Menéndez) ("Time is of the essence as it relates to Congress acting swiftly, but we shouldn't allow a somewhat arbitrary deadline to force through a fundamentally flawed bill, as the retroactive stay gives us the time to get it right.").

of the Board's powers, its functions and other legal/political issues that inevitably create ripples in Puerto Rico's governance.[4]

Among the issues in debate is whether or not the Board is a local entity or a federal entity.[5] For the purpose of this article, that issue will be discussed from the standpoint of the Eleventh Amendment sovereign immunity, a constitutional protection available to the states of the union and some of their instrumentalities. The main question is whether the Board may hide behind Puerto Rico's Eleventh Amendment sovereign immunity, which opens a different debate: Does Puerto Rico even have Eleventh Amendment Immunity?

To help answer these questions, Part II of this article will provide an overview of the backdrop of PROMESA. Initially, it will briefly explain the constitutional relationship between Puerto Rico and the United States, which is an issue that permeates the entire topic. Then, the article will provide an overview of PROMESA and its legislative history. Part III will brief the District Court of Puerto Rico's decision in *Centro de Periodismo Investigativo v. Financial Oversight and Management Board for Puerto Rico* (hereinafter, *CPI Case*), which addressed the issue of the Board's Eleventh Amendment immunity as a threshold question. Afterwards, Part IV will discuss the Eleventh Amendment sovereign immunity doctrine. This discussion includes the underlying rationale of the doctrine, as well as the elements that determine whether an entity is protected by the immunity.

Lastly, Part V will consist of the overall analysis of this article. *First*, it will briefly examine Puerto Rico's claim to Eleventh Amendment immunity as of the 2016 Supreme Court in *Puerto Rico v. Sánchez Valle*. This holding is relevant because the same dual-sovereignty analysis for the Double Jeopardy doctrine is needed in the Eleventh Amendment immunity test. That examination will conclude that Puerto Rico no longer has a legitimate claim to Eleventh Amendment Immunity, or rather that it never did, because it lacks the necessary sovereignty. *Second*, it will argue that, if Puerto Rico's Eleventh Amendment immunity had survived *Sánchez Valle*, running the Board through an arm-of-the-state analysis with respect to Puerto Rico, for purposes of Eleventh Amendment immunity, yields a circular argument. Thus, it demonstrates that immunizing the Board under the cloak of Puerto Rico's immunity would pervert the principles of the Eleventh Amendment. In fact, this article will show that the Board's classification as an arm of the state would necessarily imply that there is no Eleventh Amendment Immunity for Puerto Rico. Conclusions follow in Part VI.

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[4] *See* ROLANDO EMMANUELLI JIMÉNEZ & YASMÍN COLÓN COLÓN, "PROMESA" PUERTO RICO OVERSIGHT, MANAGEMENT, AND ECONOMIC STABILITY ACT (2017).

[5] *See* Altair Global Credit Opportunities Fund (A), LLC v. U.S., 138 Fed. Cl. 742 (2018).

II. Background Information

Many readers may be familiar with the historical and legal background of Puerto Rico and the United States. If that is the case, they may choose to skip this section and the author will take no offense. The author recognizes that it may seem tired rehashing to some. However, for those who are unfamiliar or harbor doubts about the development of the relationship between Puerto Rico and the United States, a little historical background will go a long way in understanding the bigger picture. No discussion of Puerto Rico and its relation to U.S. federalism is complete without this background. Furthermore, because Eleventh Amendment immunity is an issue of federalism and constitutional relations, this background is especially relevant to this article.

A. Puerto Rico: A United States "Territory" (1898-Present)

> *"Puerto Rico boasts a relationship to the United States that has no parallel in our history."*
>
> – Supreme Court of the United States[6]

Without a doubt, "[t]he political, economic and constitutional relations between Puerto Rico and the United States cannot be duly appreciated without taking into consideration the principal historical events that explain them."[7] The relationship between Puerto Rico and the United States, as we know it, began with the signing of the Treaty of Paris in 1898.[8] This agreement between Spain and the United States ceded Puerto Rico to the latter, among other things. Specifically, article IX of that treaty established that Congress would determine the political condition and civil rights of the people inhabiting the island.[9] This was the legal basis for the U.S. occupation of Puerto Rico.

The U.S. occupation of Puerto Rico, in 1898, was closely followed by a military regime that spanned about three years.[10] In 1901, the Foraker Act was passed in Congress.[11] This was the first stage of the civil colonial relationship. The Foraker Act mostly dealt with revenue issues and tariffs and declared Puerto

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6 Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1876 (2016)(*citing* Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 596 (1976)).

7 I RAÚL SERRANO SUPRA, DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO 427 (1997) (our translation).

8 *Id.* at 438.

9 *Id.*

10 *See Id.* at 439-42.

11 *See Id.* at 442-49.

Rico a political body with its own citizenship.[12] However, it did not include U.S. citizenship for Puerto Ricans, congressional representation or the extension of the U.S. Constitution to the inhabitants. In fact, the Foraker Act was the basis for the *Insular Cases* doctrine which consisted in the idea "that Puerto Rico was not a part of the United States in the internal or constitutional sense but [that] had nothing to do with the international status of the island . . . ."[13] Later on, in 1917, the Jones Act was passed.[14] Though the Jones Act includes some of the Foraker Act's provisions, it *did* extend part of the Bill of Rights to the inhabitants of the island through similar provisions and it granted Puerto Rican's U.S. citizenship.

In 1952, Congress allowed Puerto Ricans to create their own Constitution.[15] By passing Public Law 600, Congress formalized the United States' relationship with Puerto Rico while allowing the latter to adopt a local Constitution.[16] That local Constitution was later amended and approved by Congress. This was a pivotal moment in Puerto Rico's history, and it was considered by some to be the moment where Puerto Rico achieved sovereignty. However, as has been clearer in the past few years, Congress retained its *plenary powers* over Puerto Rico pursuant to the Territorial Clause of the U.S. Constitution. [17] That is, as they say, the state of law.

B. PROMESA and the Financial Oversight Board for Puerto Rico

> *"Since its proposed enactment this legislation has been labeled by the acronym 'PROMESA,' which in the Spanish language stands for 'promise.'"*
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> – First Circuit United States Court of Appeals[18]

i. Legislative History

Since the 1970s, Puerto Rico's public debt has increased dramatically.[19] Once Congress eliminated the tax exemptions for U.S. companies in Puerto Rico,

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12 *Id.* at 447.

13 *Id.* at 446 (*citing* Downes v. Bidwell, 182 U.S. 244 (1901)).

14 *See* SERRANO GEYLS, *supra* note 7, at 467-72.

15 *See Id.* at 485-94.

16 *Id.* at 487.

17 *See Id.* at 493. *See, also*, U.S. CONST. Art. IV § 3 cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); *See*, also, *Centro de Periodismo Investigativo v. Financial Oversight and Management Board*, 2018 WL 2094375 at 2-3 ("For a discussion on the "plenary powers" of Congress).

18 Aurelius Investment, LLC v. Puerto Rico, 915 F.3d 838, 844 f.n. 2 (1st Cir. 2019).

19 *See La deuda de Puerto Rico,* EL NUEVO DÍA, http://especiales.elnuevodia.com/datos/deuda-puerto-rico/ (last visit April 27, 2020).

investors fled, and the island fell into a deep recession.[20] In response, the local government indebted the island to cover the deficit with "a complex combination [of] mutual funds and hedge funds" leading to the devastating $73 billion debt.[21] By 2015, the former Governor, Alejandro García Padilla, publicly declared that the debt was unpayable.[22] Therefore, by 2016, Puerto Rico began to default on its payments.[23] Logically, Puerto Rico sought bankruptcy relief.[24] However, it was unable to access this relief, because Chapter 9 of the Bankruptcy Code expressly excludes Puerto Rico.[25] Consequently, Puerto Rico attempted to implement a local bankruptcy law to make up for that deficiency, but failed. The Supreme Court of the United States struck it down in *Puerto Rico v. Franklin Cal. Tax-Free Trust*,[26] The Court determined that, although Puerto Rico was not a *State* for purposes of Chapter 9 Bankruptcy, it could not pass its own Bankruptcy Law due to preemption. [27]

In response to Puerto Rico's dire financial crisis, in 2015, the U.S. Treasury Department called on Congress to legislate aid for the island.[28] Many proposals were made to address the crisis to no avail.[29] As such, in May 2016, Representative Sean Duffy introduced H.R. 5278.[30] The overall purpose of the bill was to create a federal oversight structure to supervise the financial affairs of

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[20] *See 4 claves para entender la histórica quiebra de Puerto Rico (y qué papel juega EE.UU.)*, BBC (May 4, 2017), https://www.bbc.com/mundo/noticias-america-latina-39800264 (last visit April 27, 2020).

[21] *Id.* (our translation).

[22] *Id. See also, Gobernador de Puerto Rico: "La deuda es impagable",* CNN (Jun. 29, 2015), https://cnnespanol.cnn.com/2015/06/29/gobernador-de-puerto-rico-la-deuda-es-impagable/ (las visit April 27, 2020).

[23] *See 4 claves para entender la histórica quiebra de Puerto Rico, supra* note 20.

[24] *Id.* (our translation).

[25] 11 U.S.C.A. § 101(52) ("The term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title"). *See,* also Aurelius Investment, LLC v. Puerto Rico, 915 F.3d 838, 844 (1st Cir. 2019)("From 1938 until 1984, Puerto Rico was able, like all other U.S. jurisdictions, to seek protection of Chapter 9 of the U.S. Bankruptcy Code when its municipal instrumentalities ran into financial difficulties. But without any known or documented explanation, in 1984, Congress extirpated from the Bankruptcy Code the availability of this relief for the Island")(citations omitted).

[26] Puerto Rico v. Franklin California Tax-Free Trust,136 S.Ct. 1938 (2016).

[27] *Id.* at 1941. *See,* also, *Supremo federal falla contra la quiebra*, NOTICEL (Jun. 13, 2016), https://www.noticel.com/ahora/supremo-federal-falla-contra-la-quiebra-criolla-documento/610317799 (last visit April 27, 2020).

[28] *See* D. Andrew Austin, *The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA; H.R. 5278, S. 2328)*, CONGRESSIONAL RESEARCH SERVICE (Jul. 1, 2016) at 28, (*available in* https://fas.org/sgp/crs/row/R44532.pdf) (last visit April 27, 2020).

[29] *Id.*

[30] *Id.*

the territories.[31] However, its immediate goal is to control Puerto Rico's budget, adjust its overwhelming debt and improve its overall finances. [32] Afterwards, the House Committee of Natural Resources discussed the draft and promoted studies into Puerto Rico's economy.[33] Finally, Congress passed it and, by 2016, the former U.S. President, Barack Obama, signed PROMESA into law.[34] Although it was the subject of heated debate, the bill suffered very few changes in this process.

The Puerto Rican people were not parties to this process, except through their non-voting member of Congress, the former Resident Commissioner Pedro Pierluisi. In sum, PROMESA has two main components: (1) The establishment of a Financial Oversight Board,[35] and (2) the purveyance of a bankruptcy mechanism for Puerto Rico.[36] This article focuses on the Board.

ii. Financial Oversight Board

The Board was established pursuant to Congress' plenary powers under the Territorial Clause of the U.S. Constitution.[37] The statutory purpose of the Board is "to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." [38] It is composed of seven members, all of which are appointed once they have been chosen by the President from a designated set of lists compiled by specific groups of Congressional Representatives.[39]

According to PROMESA, the Board was "created as an entity within the territorial government for which it is established . . . and shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government."[40] However, in light of the recent case law, this is not a definitive provision as to whether the Board is a federal or state entity. This issue has yet to be decided by the Supreme Court of the United States, but two lower courts have addressed the question. In *Altair Global Credit Opportunities Fund (A),*

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31 *Id.* at 2.

32 *Id.* at 2.

33 *Id.* at 28.

34 *See 4 claves para entender la histórica quiebra de Puerto Rico, supra* note 20.

35 *See* 48 U.S.C.A. §§ 2121-2152.

36 *See Id.* §§ 2161-2177.

37 *Id.* § 2121(b)(2).

38 *Id.* § 2121(a); *See Id.* §§ 2124, 2141-2152 (For the Board's specific powers and duties).

39 *Id.* § 2121(e). The legality of the appointment mechanism has been the object of constitutional review. *See* Aurelius Investment, LLC v. Puerto Rico, 915 F.3d 838, 863 (1st Cir. 2019) (deciding "that [some of] the Board Members must be, and were not, appointed in compliance with the Appointments Clause.").

40 48 U.S.C.A. § 2121(c).

LLC v. United States, the Court of Federal Claims decided that "the Board was nevertheless to be considered a 'federal entity', as required for the Court of Federal Claims' exercise of jurisdiction under the Tucker Act . . . ."[41] In *Aurelius Investment, LLC v. Puerto Rico*, the First Circuit found that the members of the Board were federal officers for purposes of the Appointment's Clause.[42] We'll describe the relevant holdings briefly.

The *Altair* Court expressly designated the Board as a federal entity. Although the *Altair* Court found support for its decision in the legislative history of PROMESA, it expressed that its holding was essentially rooted in Supreme Court precedent.[43] According to the Federal Claims Court, "Congress can determine the status of an entity only 'for purposes of matters that are within Congress's control.'"[44] Therefore, when faced with a constitutional claim, the courts must determine: "(1) whether the entity was created by 'special law;' (2) whether the entity was established 'for furtherance of governmental objectives;' and (3) whether the federal government 'retained for itself permanent authority to appoint a majority of the directors.'"[45] Using that criteria, the Federal Claims Court decided that the Board is an entity of the federal government.[46]

The *Aurelius* Court did not speak to the federal character of the Board, but of its members. In *Aurelius*, the First Circuit held "that the Board Members –other than the ex officio Member– must be, and were not, appointed in compliance with the Appointments Clause." [47] This decision entails that the Board Members are "Officers of the United States" which: (1) occupy a continuing position established by federal law; (2) exercise significant authority; and (3) exercise that significant authority pursuant to federal laws.[48] This decision was likewise based on Supreme Court precedent.

The combination of these two holdings, which are the highest-level opinions regarding the Board, so far, leads to the inevitable conclusion that the Board is a

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41 Daniel A. Klein, *Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C.A. § 2101 et seq.*, 35 A.L.R. Fed. 3d Art. 9 § 5 (2018)(*citing* 138 Fed. Cl. 742 (2018)).

42 *See* Klein, *supra* note 41, at § 4.

43 Altair Global Credit Opportunities Fund (A), LLC v. United States, 138 Fed. Cl. 742, 760 (2018).

44 *Id.* at 761 (*citing* Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 392 (1995))(brackets omitted).

45 *Altair Global*, 138 Fed. Cl. at 761 (*citing Lebron*, 513 U.S. at 400)(brackets omitted).

46 *See Altair Global*, 138 Fed. Cl. at 760-63.

47 Aurelius Investment, LLC v. Puerto Rico, 915 F.3d 838, 863 (1st Cir. 2019). At the time this article is being written, the Supreme Court has added *Aurelius* to its docket. *See* Amy Howe, *Justices add Puerto Rico appointments clause case to next term's docket (Corrected)* (Jun. 20, 2029 3:12pm), https://www.scotusblog.com/2019/06/justices-add-puerto-rico-appointments-clause-case-to-next-terms-docket/.

48 *Aurelius*, 915 F.3d at 856 (citations omitted).

federal entity with federal officers. However, there is another lesson in these cases. Although PROMESA is an unprecedented piece of legislation and the Board is an entity without parallel, when the issue is of constitutional significance, they do not operate in a vacuum. Constitutional precedent applies and neither Congress nor the Board are above it.

Notwithstanding, these holdings are not the beginning or the end of the inquiry regarding the Board's nature, whether federal or territorial. A Supreme Court decision reversing either of these cases, with their context specific conflicts, would not necessarily be dispositive in other areas of law. The important thing to remember is *why* these courts determined that the Board is a federal entity with federal officers. These are the reasons that will influence the discussion for purposes of the Eleventh Amendment Immunity doctrine defined below. The Board is created by Congress and its members were designated by the federal government.

III. District Court Decision in Centro de Periodismo Investigativo

In 2017, the *Centro de Periodismo Investigativo*[49] (hereafter, *CPI*) sued the Board, under Puerto Rican constitutional law, to gain access to public documents under the Board's control.[50] The suit was brought in the District Court of Puerto Rico, pursuant to Section 106(a) of PROMESA. In response, the Board moved for dismissal and raised the Eleventh Amendment Immunity, among other arguments.[51] The District Court held that Congress had waived or abrogated the Board's sovereign immunity.[52]

Although the Court disposes of the issue in this matter, there are two conveniently placed footnotes that open up the questions this article hopes to answer. Footnote number six, reads: "The parties did not address whether the Board should be considered an 'arm' of Puerto Rico for Eleventh Amendment purposes. The Court assumes without deciding that the Board is an 'arm of Puerto Rico' because the Commonwealth funds it."[53] Meanwhile, footnote number seven reads: "In this Opinion and Order, the Court does not opine on the availability

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[49] CPI is a non-profit entity created to promote the people of Puerto Rico's access to information through investigative journalism and litigation. It coexists with the legal clinic for access to information of the Interamerican University of Puerto Rico. *Quiénes somos*, CENTRO DE PERIODISMO INVESTIGATIVO, http://periodismoinvestigativo.com/centro/ (last visit April 27, 2020).

[50] Centro de Periodismo Investigativo v. Financial Oversight and Management Board for Puerto Rico, CV01743JAG, 2018 WL 2094375 at. 1 (D.P.R. 2018).

[51] *Id.*

[52] *Id.* at 2.

[53] *Id.* at 5 f.n. 6 (citations omitted).

of Eleventh Amendment immunity to Puerto Rico and its instrumentalities. The holding today is confined to the Board and its lack of access to Eleventh Amendment protection."[54]

However, the District Court does make some expressions on the subject later, which are similar to the arguments made in this article:

> Unlike **Pennhurst**, this case does not involve federalism concerns because the Board is an entity within the Puerto Rico territorial government and not a state. Eleventh Amendment immunity is derived from the power retained by the states when they entered the Union. This 'residual sovereignty' comes from the notion that, while states surrender many of their powers to the federal government when they joined the Union, they retained 'a residuary and inviolable sovereignty.' Puerto Rico has never entered the Union as a state or been considered a sovereign distinct from the United States. Thus, since the Board was created as an entity within Puerto Rico, a territory of the United States, the idea of "dual sovereignties" under federalism is not violated.[55]

Though the District Court cautiously sidestepped these issues, the inclusion of these side notes suggests gaps in our current legal order. There are two considerations to be made here: (1) whether we can still justify Puerto Rico's Sovereign Immunity in light of the recent Supreme Court decision *Puerto Rico v. Sánchez Valle* which confirms the legal inexistence of Puerto Rico's sovereignty; and (2) whether, in the alternative, the Board could have shielded itself behind Puerto Rico's Eleventh Amendment Immunity, barring congressional abrogation.

IV. Eleventh Amendment Immunity

The Eleventh Amendment of the U.S. Constitution reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[56] Essentially, the Eleventh Amendment bars suits in federal court against one of the states or a foreign sovereign. However, through jurisprudence an entire doctrine has been developed to address issues which arise out of suits in federal court where some form of State interest may be present. The gist of it is that, when an entity that belongs to a State

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[54] *Id.* at 5 f.n. 7.

[55] *Id.* (citations omitted).

[56] U.S. CONST. amend. XI.

is sued in federal court, the Eleventh Amendment is raised as a shield to prevent litigation from taking place.

Of course, with litigation and development the concept is fine-tuned. Not every conceivable state entity is a sovereign and not all suits are barred to the same extent. To understand this, first, we need to get into *who* the Eleventh Amendment is meant to protect from suit. Then, we can see how far it goes.

A. The Sovereign in Eleventh Amendment Immunity

As mentioned, the Eleventh Amendment immunity is a byproduct of the federal system of the United States. Under this system, the constitutional framework of the United States is defined by the presence of a dual sovereignty.[57] This is the idea that the United States is one sovereign and each state of the union has its own sovereignty separate from the federal government. The premise of dual sovereignty is that "[u]pon ratification of the Constitution, the [s]tates entered the Union with their sovereignty intact."[58] This was not part of the original text of the Constitution and was instead added in the amendments. Yet, this is the legal fiction that operates in the relationship between the states and the federal government. Thus, grounded in the principles of federalism, the Eleventh Amendment provides that each state is a sovereign entity and therefore "not amenable to suit without its consent."[59] In other words, states cannot be sued in federal court.

This is the essence of Eleventh Amendment immunity, also known as Sovereign Immunity. The amendment "acts as a gatekeeper to the enforcement of federal law against state actors."[60] In fact, "[t]he very object and purpose of the [Eleventh] Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."[61] What this means is that, "[t]he Amendment is rooted in a recognition that the [s]tates, although a union, maintain certain attributes of sovereignty, including sovereign immunity."[62]

Although the states have this immunity inherently, there are exceptions to its reach.[63] For example, a state may waive its immunity and consent to be sued in

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[57] Sossamon v. Texas, 563 U.S. 277, 283 (2011) (*citing* Federal Maritime Comm'n v. South Carolina Ports Authority, 535 U.S. 743, 751 (2002)).

[58] *Id.* (internal quotation marks omitted)

[59] Seminoles Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

[60] LAURA E. LITTLE, EXAMPLES & EXPLANATIONS: FEDERAL COURTS 371 (3rd ed. 2013). *See* William E. Thro, *The Future of Sovereign Immunity*, 215 Ed. Law Rep. 1, 4-7 (2007) (Explaining the constitutional theory behind sovereign immunity).

[61] Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (*quoting* In re Ayers, 123 U.S. 443, 505 (1887)).

[62] *Puerto Rico Aqueduct*, 506 U.S. at 146 (*citing* Hans v. Louisiana, 134 U.S. 1, 13 (1890)).

[63] Welch v. Texas Dept. of Highways and Public Transport., 483 U.S. 468, 473 (1987).

federal court.[64] Furthermore, Congress can abrogate sovereign immunity if it acts pursuant to some of its powers.[65] In the following paragraphs, we will explain the extent of the Eleventh Amendment immunity. That said, undoubtedly, this means that the *sovereign* that the Eleventh Amendment protects is the state itself. Other entities may shield themselves through the judicially elaborated doctrines, but the main focus of Eleventh Amendment immunity is the *state*. The *state* is always a sovereign for this doctrine. The issue is when an entity, that is not a state, wants to shield itself behind that immunity.

B. The Extent of Eleventh Amendment Immunity

The scope and limitations of Eleventh Amendment Immunity have been laid out by the courts. For instance, the courts have established: (1) what actions are barred by Sovereign Immunity; (2) which plaintiffs are barred by Sovereign Immunity, and (3) which defendants are protected by Sovereign Immunity. The first two will only be mentioned briefly.

The text of the Eleventh Amendment limits the scope of immunity to suits in law or equity. This definition omits admiralty and maritime suits.[66] Though Sovereign Immunity, as written, applies only to suits against a state by citizens of another state, the Supreme Court has extended it to suits against a state brought in federal court by its own citizens.[67] This means that a state is immune from suit in federal courts brought by citizens of another state, citizens of a foreign state, or citizens of the same state.

As far as what entities can shield themselves behind the Eleventh Amendment, the courts have progressively defined them. The sovereign for this purpose "encompasses not only actions which a State is actually named as the defendant, but also actions against state agents and state instrumentalities."[68] As the Supreme Court has expressed, "[a] consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law."[69]

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64 *Id.* (*citing* Clark v. Barnard, 108 U.S. 436, 447 (1883)).

65 *Welch*, 483 U.S. at 474.

66 LITTLE, *supra* note 60, at 378.

67 Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004).

68 Regents of the University of California v. Doe, 519 U.S. 425, 429 (1997).

69 Northern Ins. Co. of New York v. Chatham County, Ga., 547 U.S. 189, 190 (2006)(holding that counties do not share sovereign immunity).

i. The Arm of the State – Defining Criteria

Up until now, this doctrine had been used in three general scenarios: (1) for political subdivisions of the state, which are not entitled to immunity; (2) for entities established by two or more states by compact and approved by Congress; and (3) for special-purpose public corporations.[70] The test is to establish whether by protecting the entity, the Eleventh Amendment would be fulfilling its twin goals. "[Those] twin goals of the Eleventh Amendment–protection of the state's treasury and of its dignitary interests–explicitly govern the arm-of-the-state analysis."[71]

What does this mean? It means that the Eleventh Amendment has two main goals. First, but not foremost, it aims to protect the state's treasury. That is, to protect its funds and its ability to direct its funds in the way that it sees fit. This goal is part of the respect that is owed to the states as sovereigns and to their respective citizens who, through their elected officials, have control over the treasury of the state.[72] Second, and to my understanding most importantly, the Eleventh Amendment strives to protect the dignity of the states against the encroaching federal government. [73] Thus, for the Eleventh Amendment to cover an entity that is not a state, that is, for it to be an arm-of the-state, protecting it must be necessary to fulfill the twin goals of the doctrine.

The first step is to analyze how the state has structured the entity.[74] The structural factors for this analysis include: (1) "how state law characterizes the entity"; (2) "the nature of the functions performed by the entity"; (3) the entity's fiscal relationship with the state; and (4) "how much control the state exercises over the operations of the entity."[75] As we can see, the test requires an analysis of how the entity fits within the state and if the state meant to shield the entity. If, after examining these elements, it is clear that the state meant for the entity to share its sovereignty, the analysis is over.[76] However, when those structural indicators are ambiguous, then vulnerability of the fisc becomes dispositive.[77] This is a question

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[70] *See* Fresenius Medical Care Cardiovascular Resources, Inc. v. P.R. & Caribbean Cardiovascular Center Corp, 322 F.3d 56, 61 (1st Cir. 2003).

[71] *Id.* at 63 (*citing* Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 39-41 (1994)).

[72] *Fesenius.* 322 F.3d at 68. *See* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine,* 43 WAKE FOREST L. REV. 765, 790 (2008).

[73] *Fesenius.* 322 F.3d at 68; Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

[74] *Fresenius*, 322 F.3d at 65.

[75] Grajales v. Puerto Rico Ports Authority, 831 F.3d 11, 18 (1st Cir. 2016).

[76] *Id.*

[77] *Fresenius*, 322 F.3d at 65. *See,* also, *Grajales*, 831 F.3d at 18.

of whether the state has obligated itself to pay the entity's debts.[78] By passing an entity through this filter, we can determine if it is covered by the immunity or not.

The twin goals are the underlying values of the doctrine. When the factors become confusing or, perhaps, unyielding, it bears remembering why they exist. It is not a matter of facts, purely, there is an element of intent and a political legal philosophy that also shapes the analysis.

ii. Specific Entities Not Covered by Eleventh Amendment Immunity

The Supreme Court has already decided that the Eleventh Amendment immunity does not cover political subdivisions, such as municipalities and counties.[79] For this purpose, a political subdivision is defined as "a local governmental entity that is in some ways distinct from the state, but that nevertheless exercises a 'slice of state power.'"[80]

Nonetheless, the leading Supreme Court decision on Eleventh Amendment Immunity, *Hess*, is specifically about bistate entities created pursuant to the Constitution's Interstate Compact Clause (hereinafter, the *Compact Clause*).[81] The Compact Clause provides a mechanism for states to enter agreements that "address problems that are not neatly contained within state boundaries."[82] A bistate entity created in this way "is an agency created by an agreement, or compact, between two or more states, *which is approved by Congress*."[83] These usually include ports or control bridges.[84] We should think of it as an entity with three power sources, two states and one federal.

The *Hess* court stressed that these bistate entities could not be grouped with other state entities for purposes of Sovereign Immunity,[85] meaning that they are not shielded. The underlying reasoning is that a "[s]uit in federal court is not an affront to the dignity of a Compact Clause entity"[86] because a federal court does

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78 *Grajales*, 322 F.3d at 65.

79 Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979).

80 Anthony J. Harwood, *A Narrow Eleventh Amendment Immunity for Political Subdivisions: Reconciling the Arm of the State Doctrine with Federalism Principles*, 55 FORDHAM L. REV. 101, 102 (1986)(citations omitted).

81 *Hess*, 513 U.S. at 35. This means that it is a creation of two states made with Congressional approval. *See* U.S. CONST. Art. I § 10, cl. 3.

82 Matthew S. Tripolitsiotis, *Bridge over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 YALE L. & POL'Y REV. 163, 164 (2005).

83 *Id.* at 165(emphasis added).

84 *Id.* at 164.

85 *Hess*, 513 U.S. at 42.

86 *Id.* at 41.

not represent "the instrument of a distant, disconnected sovereign."[87] In fact, "the federal court is ordained by one of the entity's founders."[88] This refers to the fact that Congress's approval is required for the bistate entity to come to life in the first place. Therefore, since bistate "entities owe their existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States,' their political accountability is diffuse; *they lack the tight tie to the people of one State that an instrument of a single State has*[.]"[89]

For the purposes of this article, this distinction is crucial. The Supreme Court has already recognized that an entity cannot shield itself from federal court intervention if it is the result of federal action. A bistate entity, because its inception is tied to the federal government through Congress, is not an extension of a state or an expression of the state's sovereign power. Thus, the conflicting interests of federalism are absent. As the *Hess* court said, "within any single [s]tate in our representative democracy, voters may exercise their political will to direct state policy; bistate entities created by compact, however, *are not subject to the unilateral control of any one of the States that compose the federal system*."[90] Therefore, they are not protected by the Eleventh Amendment immunity. These expressions will undoubtedly influence the analysis with regards to the Board.

V. Federal Oversight Board and Puerto Rico's Sovereign Immunity

Marginal sovereign immunity situations are those in which courts decide whether to extend sovereign immunity where it is unprecedented.[91] In those circumstances, courts should always be guided by the principles underlying the Eleventh Amendment doctrine.[92] In the CPI case, the Board, which in itself is an unprecedented entity, raised the Eleventh Amendment sovereign immunity as defense.[93] Although the District Court decided that Congress had abrogated that defense for the Board, the real question is if the Board could raise it in the first place.

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87 *Id.*

88 *Id.*

89 *Id.* at 42 (emphasis added).

90 *Id.* (emphasis added).

91 *Florey*, *supra* note 72, at 784.

92 *Id.* Florey provides a set of suggested principles that courts should use in deciding marginal sovereign immunity cases. See *Id.* at 821-35.

93 Centro de Periodismo Investigativo v. Financial Oversight and Management Board for Puerto Rico, CV01743JAG, 2018 WL 2094375 at. 1 (D.P.R. 2018).

C. Puerto Rico's Eleventh Amendment Immunity or Lack Thereof

Because the Board is raising Puerto Rico's own immunity against its citizens, to begin this inquiry, it is important to address whether Puerto Rico has Eleventh Amendment immunity. Now, the Supreme Court has never addressed whether Puerto Rico has Eleventh Amendment sovereign immunity. However, it held that Puerto Rico had common law sovereign immunity in 1913.[94] According to Adam Chandler:

> The Supreme Court is aware that deciding when to treat Puerto Rico like a state—and when not to—is a "delicate subject." Perhaps accordingly, in 1993, the Supreme Court expressly declined to rule on the question of Puerto Rico's Eleventh Amendment immunity, and despite being faced with regular opportunities to do so, the Court has not spoken on the issue since that time.[95]

On the other hand, since 1981, the First Circuit has held that Puerto Rico enjoys Eleventh Amendment protection.[96] Nonetheless, as Chandler observed, "[d]espite the decades of reliance on Puerto Rico's Eleventh Amendment immunity, there is no rigorous discussion or defense of it in any of the First Circuit's case law."[97] Upon examination, Chandler's observation checks out. Most of the First Circuit cases plainly assert that Puerto Rico has Eleventh Amendment immunity because the previous case did the same even in a footnote.[98] This makes it difficult to ascertain *what* Puerto Rico's Eleventh Amendment immunity was

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94 Adam D. Chandler, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 YALE L.J. 2183, 2188 (2011) (*citing* Porto Rico v. Rosaly y Castillo, 227 U.S. 270 (1913)).

95 Chandler, *supra* note 94, at 2188 (notes and citations omitted).

96 Chandler, *supra* note 94, at 2189 (*citing* Ezratty v. Puerto Rico, 648 F.2d 770, 776 f.n. 7 (1st Cir. 1981)).

97 Chandler, *supra* note 94, at 2191. *See* Forley, *supra* note 89, 822 ("In particular, lack of individualized analysis tends to promote a general tendency toward overexpansion of sovereign immunity by making it more difficult for future courts to depart from precedent.").

98 *See* for example, Maysonet-Robles v. Cabrero, 323 F.3d 43, 48 f.n. 3 (1st Cir. 2003)("This circuit has consistently held that Puerto Rico enjoys immunity from suit equivalent to that afforded to the States under the Eleventh Amendment."); Arecibo Community Health Care, Inc. v. Cmmw. of Puerto Rico, 270 F.3d 17, 21 f.n. 3 (1st Cir. 2001)("It is well settled in this circuit that the Commonwealth of Puerto Rico 'is protected by the Eleventh Amendment to the same extent as any state . . . .'"); Ortiz-Feliciano v. Toledo-Dávila, 175 F.3d 37, 39 (1st Cir. 1999)("This circuit has already decided that the Commonwealth is protected by the Eleventh Amendment to the same extent as any state . . . ."); Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth., 991 F.2d 935, 939 f.n. 3 (1st Cir. 1993)("We have consistently treated Puerto Rico as if it were a state for Eleventh Amendment purposes.").

based on, which generally means that the thought process goes as far as: "well, it's *like* a state."

But, as previously explained, Eleventh Amendment immunity is premised on the dual sovereignties of U.S. federalism.[99] Because the states entered the union with their sovereignty intact, they cannot be brought into federal court without their consent.[100] Now, much like in other instances, Puerto Rico has been treated as a state for purposes of Eleventh Amendment immunity by the lower courts, without the benefit of the Supreme Court's decision. In other words, there is no on-point precedent above the First Circuit to dispute nor confirm that Puerto Rico is a state for purposes of the Eleventh Amendment.

It is noteworthy that the common law immunity granted to Puerto Rico was granted under such dissimilar circumstances, in 1913,[101] that to extend that holding's reach this far in time would be absurd. Things have changed since 1913. Puerto Ricans have been granted U.S. citizenship, given the opportunity to adopt a Constitution, and subsequently suffered the imposition of the Board with PROMESA's passing. These twists of Puerto Rico's history have a direct effect on the conception of its sovereignty as a legal reality. The level of absurdity is enough to call Puerto Rico Schrodinger's Sovereign, it is and isn't a sovereign for the purpose of any doctrine until or unless a Supreme Court decision says otherwise. Yet, the courts continue to drag declarations of Puerto Rico's sovereignty through footnotes and repetitions without considering the legal realities that stare them in the face.

In the political realm, the question of Puerto Rico's sovereignty has undergone radical ups and downs. However, while it is true that there is no on-point precedent, Puerto Rico's *sovereignty has* been the object of Supreme Court judicial review in another context. *Puerto Rico v. Sánchez Valle* made it to the Supreme Court as a Double Jeopardy issue. Yet, the result was devastating for many sectors of Puerto Rico, as it deflated any hopes of a judicial declaration recognizing Puerto Rico's sovereignty. The Supreme Court used the dual sovereignty doctrine and determined that Puerto Rico is not a distinct sovereign from the United States.

iii. Puerto Rico v. Sánchez Valle and the Dual-Sovereignty Analysis

In 2016, the Supreme Court decided *Puerto Rico* v. *Sánchez Valle*.[102] This case reached the Supreme Court of the United States after the Supreme Court of Puerto

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[99] Sossamon v. Texas, 563 U.S. 277, 283 (2011) (citing Federal Maritime Comm'n v. South Carolina Ports Authority, 535 U.S. 743, 751 (2002)).

[100] *Sossamon*, 563 U.S. at 283.

[101] *See* Chandler, *supra* note 94, at 2188 (*citing* Porto Rico v. Rosaly y Castillo, 227 U.S. 270 (1913)).

[102] Puerto Rico v. Sánchez Valle, 136 S.Ct. 1863 (2016).

Rico ruled in favor of a criminal defendant on the issue of Double Jeopardy. It was originally a firearms case which was being prosecuted both by Puerto Rico authorities and federal authorities, but a plea was reached in the federal proceedings while the other continued. The ultimate holding of the case was that Puerto Rico and the United States may not "prosecute a single defendant for the same criminal conduct . . . because the oldest roots of Puerto Rico's power to prosecute lie in federal soil."[103]

In the face of Double Jeopardy's "dual-sovereignty carve-out" the Supreme Court considered whether Puerto Rico and the United States were different sovereigns.[104] "Truth be told, however, 'sovereignty' in this context does not bear its ordinary meaning . . . The degree to which an entity exercises self-governance–whether autonomously managing its own affairs or continually submitting to outside direction–plays no role in the analysis." [105] As Justice Kagan explained it, "[t]he inquiry is thus historical, not functional . . . ." [106]

Under that analysis, the states of the union are separate sovereigns from the United States, which is why Double Jeopardy does not bar a state and the federal government from prosecuting an individual for the same offense.[107] That is by virtue of the Tenth Amendment which reserved state sovereignty upon entering the union, a sovereignty that gives them the power to prosecute.[108] This concept of sovereignty, for example, does not extend to municipalities, who get their power to prosecute from the state they are in regardless of their level of autonomy. [109]

Justice Kagan concluded that Puerto Rico's "constitutional developments were of great significance and, indeed, made Puerto Rico 'sovereign' in one commonly understood sense of that term[,]"[110] but the dual-sovereignty test focuses "not on the fact of self-rule, but on where it came from." [111] Therefore, since "Congress conferred the authority to create the Puerto Rico Constitution," [112] Puerto Rico's authority to prosecute comes from Congress and Double Jeopardy bars prosecution of an individual for the same offense in federal jurisdiction and Puerto Rico. [113]

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[103] *Id.* at 1868.

[104] *Id.* at 1870.

[105] *Id.*

[106] *Id.* at 1871.

[107] *Id.* (*citing* Heath v. Alabama, 474 U.S. 82 (1985)).

[108] *Sánchez Valle*, 136 S.Ct. at 1871.

[109] *Id.* at 1872.

[110] *Id.* at 1874.

[111] *Id.*

[112] *Id.* at 1875.

[113] *Id.* at 1876.

In sum, Puerto Rico does not have dual-sovereignty, because the source of its autonomy is not the same as a state's but more like a city's or municipality's.

Like the Double Jeopardy dual-sovereignty analysis, the sovereignty analysis of Eleventh Amendment immunity is premised on the principles of federalism. Double Jeopardy dual-sovereignty hopes to preserve the states' rights to prosecute criminal offenders, without the federal government intervening and preventing them from doing so. Eleventh Amendment immunity's dual-sovereignty seeks to prevent the state from being subject to the indignity of being taken to federal court without its consent.[114] In both cases, the threshold issue seems to be, if this entity enter the United States with its sovereignty intact.[115]

In *Sánchez Valle*, the Supreme Court unequivocally held that Puerto Rico's Constitution is derivative of an act of Congress, which means that, from a historical standpoint, Puerto Rico does not have a separate sovereignty from the federal government.[116] Thus, "Puerto Rico cannot benefit from [the] dual-sovereignty doctrine."[117] The United States and Puerto Rico are not separate sovereigns.[118] How then can Puerto Rico claim Eleventh Amendment sovereign immunity in federal courts? It can't. It would be contrary to the principles of federalism. Puerto Rico cannot be protected from suit in federal court on the idea that its dignity would be attacked by another sovereign if there is no other sovereign.

The historical analysis requires that the ultimate source of power, the original source, be distinct for there to be sovereignty independent from the U.S. government. Puerto Rico does not have that. According to the *Sánchez Valle* court, Puerto Rico did not enter its relationship with the United States "with sovereignty intact." First, because it never had sovereignty, given that it was a Spanish colony before the U.S. invasion. Second, because the Puerto Rico Constitution, the pillar on which all else in Puerto Rico's state of law rests, did

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[114] Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (*quoting* In re Ayers, 123 U.S. 443, 505 (1887)).

[115] Virginia Off. for Protec. and Advoc. v. Stewart, 563 U.S. 247, 253 (2011)("[H]owever, we have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant.").

[116] *See* Puerto Rico v. Sánchez Valle, 136 S.Ct. 1863, 1874 (2016) ("But our approach is historical. And if we go back as far as our doctrine demands–to the 'ultimate source' of Puerto Rico's prosecutorial power–we once again discover the U.S. Congress."(citations omitted)).

[117] *Id.* at 1875.

[118] *Id.* at 1876.

[119] *Id.* at 1875-76 ("That makes Congress the original source of power for Puerto Rico's prosecutors–as it is for the Federal Government's. The island's Constitution, significant though it is, does not break the chain.").

not "break the chain."[119] Political discourse aside, Puerto Rico is not a sovereign for dual-sovereignty purposes.

D. Marginal Sovereignty Analysis and the Financial Oversight Board

In the event that Puerto Rico was a sovereign for the dual-sovereignty purposes of Eleventh Amendment immunity, despite the historical analysis that begged a different result in *Sánchez Valle*, the question would remain whether the Board can shield itself behind that immunity.[120] As previously mentioned, Congress created the Board to be an entity within the Puerto Rico government, not a federal entity.[121] Evidently, it is not a state nor a bistate entity, it is also not a municipal corporation or a political subdivision of a state. Thus, to answer whether the Board could claim Puerto Rico's Eleventh Amendment immunity as its own would require the arm-of-the-state analysis.

As previously mentioned, the Eleventh Amendment immunity analysis responds to its twin pillars: dignity and treasury.[122] When we evaluate whether a separate entity is an arm-of-the-state and shares the state's immunity, we look to those pillars. First, we determine if the state's dignity interests are at stake, which depends on how the state has structured it in the first place. [123] Although there are some factors to consider, the main question is if the state meant for this entity to be protected.[124] If that does not dispose of the question in favor of the entity, then we examine the vulnerability of the treasury and whether the state has obligated itself to pay the entity's debts. [125] This inquiry posits an initial problem, beyond the scope of Sovereign Immunity cases thus far: the Board is a creature of Congress.

iv. What Dignity Interest?

The framework of the Eleventh Amendment sovereign immunity doctrine is set up to protect the states where they have taken upon themselves the responsibility to respond for an entity. This responds, again, to the underlying federalist principles

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[120] It should be noted that "the entity asserting Eleventh Amendment immunity . . . bears the burden of showing it is an arm of the state." Fresenius Medical Care Cardiovascular Resources, Inc. v. P.R. & Caribbean Cardiovascular Center Corp, 322 F.3d 56, 61 (1st Cir. 2003)(citations omitted).

[121] 48 U.S.C.A. § 2121(c). This is not to say that we agree with this conclusion, as will be discussed further down.

[122] *Fresenius*, 322 F.3d at 63 (*citing* Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 39-41 (1994)).

[123] *Fresenius*, 322 F.3d at 65.

[124] *Id.*

[125] *Id.*

of the doctrine. But Puerto Rico did not take it upon itself to do anything for the Board, because, as we have seen, Puerto Rico was not included or consulted before the Board was created. That alone renders the entire first prong of the arm-of-the-state analysis absurd. Therefore, the question is: Did Puerto Rico structure the Board in such a way that it is protected? No. Congress created the Board and unilaterally inserted it into, and above, Puerto Rico's government structure.

The structural indicia that the doctrine espouses is also rendered absurd under these circumstances. These factors include "how *state* law characterizes the entity",[126] but the Board was created by a *federal* law. Another factor is, "how much control the *state* exercises over the operations of the entity."[127] Suffice it to say, that the Puerto Rico government has absolutely no authority or control over the Board; Puerto Rico is actually subject to the Board's authority.

There are, however, two remaining factors: "the nature of the functions performed by the entity" and the entity's fiscal relationship with the state.[128] PROMESA establishes the Board's duties, all of which are geared toward the overall goal of aiding Puerto Rico's journey to fiscal responsibility.[129] The Board approves the fiscal plan and budget of the Puerto Rico government and its instrumentalities.[130] Through these powers, the can also block legislation or other government actions,[131] and it can recommend laws be repealed or amended to comply with the purposes of PROMESA or, more accurately, with the Board's fiscal plan and budget.[132] Although the Board cannot legislate, it uses PROMESA's framework to push policy agendas and attempts to pressure the Puerto Rico Government into accepting its policy. Thus, the Board's functions are very closely related to the Puerto Rico government's. Furthermore, while it was given complete discretion to determine its own budget, the Board does not have its own source for budget funds, nor did Congress allocate funds for that purpose. [133]

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[126] Grajales v. Puerto Rico Ports Authority, 831 F.3d 11, 18 (1st Cir. 2016)(emphasis added).

[127] *Id.*

[128] *Id.*

[129] *See* 48 U.S.C.A §§ 2121, 2124 (West 2019).

[130] *See Id.* §§ 2141-2143.

[131] *See Id.* § 2144.

[132] For example, the Board has adamantly advocated for the repeal of Law 80, a legislation that protects employees from being fired without just cause, because of their interest in implementing at-will employment to further their fiscal plan. *See,* Inter News Service, *Junta de Control Fiscal modificará planes fiscales ante rechazo a derogación de Ley 80*, Metro, (June 29, 2018), https://www.metro.pr/pr/noticias/2018/06/29/junta-de-control-fiscal-modificara-planes-fiscales-ante-rechazo-a-derogacion-de-ley-80.html (last visit April 27, 2020); *See* Adriana de Jesús Salamán, *La Junta explica su insistencia con la Ley 80*, NOTICEL, (June 29, 2018), https://www.noticel.com/ahora/junta-fiscal/la-junta-explica-su-insistencia-con-la-ley-80/761003057 (last visit April 27, 2020).

[133] *See Id.* § 2127.

Instead, the Board's functions are paid for, exclusively, by Puerto Rican taxpayer dollars.[134] That's two out of four factors weighing in favor of extending Puerto Rico's Eleventh Amendment immunity to the Board.

To say that this result is ambiguous, though mathematically correct, misses the point of the inquiry. Is Puerto Rico's dignity at stake? Did Puerto Rico mean for the Board to be immune from suit in the only forum that Congress granted jurisdiction over it? Of course not. Puerto Rico's dignity is no more protected by this extension than it was by the creation of PROMESA in the first place. Thus, the first prong is not dispositive, but this is not over yet.

v. Why is the Public Treasury Vulnerable?

Because the dignity interest prong is not dispositive, the potential vulnerability of the fisc should be.[135] This prong, unfortunately, is very quick to answer. Because the Board does not have its own budget, PROMESA forces the Puerto Rico Government to separate funds to pay for the Board.[136] Therefore, evidently, if there was litigation against the Board where damages were adjudicated, the Puerto Rican Treasury would be the only source of compensation. This would make the Board an arm-of-the-state for Eleventh Amendment purposes. Nothing else to see here, right? Maybe. The First Circuit has warned that "[a]n erroneous arm-of-the-state decision may frustrate, not advance, a state's dignity and its interests."[137]

The public treasury prong is tied to "the idea that sovereign immunity offers a protection against the potentially undemocratic effects of private litigation."[138] The problem is that "it allocates public funds in a way that is primarily determined by the judiciary, not the democratic process . . . ."[139] This rationale is useful.[140] For our analysis, especially, this underlying democratic rationale poses a conflict. The Board is not a democratically elected, nor representative, body. It is selected by the United States Congress and the President without even consulting the people of Puerto Rico.[141] Moreover, Congress gave the Board the power to practically

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134 *See Id.* § 2127.

135 Fresenius Medical Care Cardiovascular Resources, Inc. v. P.R. & Caribbean Cardiovascular Center Corp, 322 F.3d 56, 65 (1st Cir. 2003). *See Grajales*, 831 F.3d at 18.

136 48 U.S.C.A. § 2727 (West 2019).

137 *Fresenius*, 332 F.3d at 64.

138 Florey, *supra* note 72, at 790.

139 *Id.*

140 *Id.* at 793.

141 *See* 48 U.S.C.A. § 2121(e)(West 2019).

142 *See Id.* §§ 2141-2144.

control Puerto Rico's budget allocations and invalidate or otherwise obstruct the actions of democratically elected officials.[142]

vi. The Underlying Principles of the Eleventh Amendment and the Board as a Federal Entity

As previously concluded, the Board should be considered a federal entity.[143] When faced with a constitutional claim, Congress's designation of the Board as an entity within the Puerto Rico government falls short.[144] Among other factors, what we should consider is: the type of law that creates the entity, the objectives of the entity, whether the federal government was the sole authority to appoint its members and whether its members exercise their authority pursuant to federal law. [145] To recap, the Board is a creature of Congress which is created and acts pursuant to federal law. Its members are appointed by the federal government. Evidently, this is a federal entity that Congress built into the scheme of Puerto Rico's governance. It is unprecedented, but it does not operate in a vacuum.

The Supreme Court has already addressed some unusual entities in the Eleventh Amendment immunity doctrine. As previously discussed, the *Hess* court, by voice of Justice Ginsburg, explained that bistate entities were not enveloped by any state's Eleventh Amendment protection because Congress was one of its founders.[146] Bistate entities were created pursuant to the Compact Clause, much like the Board was created pursuant to the Territorial Clause of the U.S. Constitution. Furthermore, just like the bistate entities, the federal court is not "the instrument of a distant, disconnected sovereign" from the Board. [147] On the contrary, the federal courts were "ordained by one of the entity's founders," or, in the case of the Board, its only founder.[148] Furthermore, the Board's *political accountability* is not with the people of Puerto Rico, which diffuses its tie to Puerto Rico.[149]

The drawback to comparing the Board with a bistate entity is Puerto Rico's liability for the Board's obligations,[150] which is tied to the Board's power over Puerto Rico's budget. Therefore, although the Puerto Rico treasury could be

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[143] *See* Aurelius Investment, LLC v. Puerto Rico, 915 F.3d 838 (1st Cir. 2019); Altair Global Credit Opportunities Fund (A), LLC v. United States, 138 Fed. Cl. 742 (2018).

[144] *Altair Global*, 138 Fed. Cl. at 761 (*citing* Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 392 (1995))(brackets omitted).

[145] *See Altair Global*, 138 Fed. Cl. at 761; *Aurelius*, 915 F.3d at 856.

[146] Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 41 (1994).

[147] *Id.*

[148] *Id.*

[149] *See Id.* at 42.

[150] *See Id.* at 37.

vulnerable if the Board were taken to court, protecting the Board is not equivalent to protecting Puerto Rico. Puerto Rico did not take it upon itself to respond for the Board.[151] The Board is itself an intervening federal actor, infringing upon whatever semblance of sovereignty Puerto Rico has left. Covering the Board in Eleventh Amendment immunity would not serve the interests of the doctrine. On the contrary, suits against the Board would likely result from the people of Puerto Rico's need to safeguard their democratic choices and constitutional rights. The best example of that is the CPI case.

VI. Conclusion

When the Board raised sovereign immunity in the CPI case, it did so against a claim for injunctive relief. The CPI sought access to public documents that the Board had in its power and did so under Puerto Rico's Constitution.[152] Had the Board succeeded, Puerto Rican citizens would be entirely deprived of action against it, as Congress did not provide any other forum in which to sue the Board.[153] That's why the District Court decided that Congress abrogated the Board's immunity.[154]

However, had the parties raised the arguments, the District Court could have easily concluded that, after *Sánchez Valle*, Puerto Rico cannot be thought of as a sovereign warranting Eleventh Amendment immunity. Furthermore, it would be an affront to the principles of the Eleventh Amendment to extend Puerto Rico's hypothetical immunity to the Board. The delicate balance of federalism that doctrines, such as Eleventh Amendment immunity, seek to preserve would not be protected by this exercise. On the contrary, it would be the epitome of federal overstepping to grant a federal entity the immunity that belongs to the states.

The Board is an entity created by federal law, pursuant to the most sweeping power of Congress. It responds directly to the federal government, in the form of reports which describe its progress, and its members are only removable by the President of the United States. It does not respond to the people nor to the government of Puerto Rico. It is a force of unbridled federal power, unrelated to the will of Puerto Ricans. Should the courts wish to protect Puerto Rico's

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[151] *Fresenius*, 322 F.3d at 65.

[152] Centro de Periodismo Investigativo v. Financial Oversight and Management Board, 2018 WL 2094375 at 1.

[153] *See* 48 U.S.C.A. § 2126(a) (West 2019)("[A]ny action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory . . . .").

[154] *See Centro de Periodismo Investigativo*, 2018 WL 2094375 at 7.

treasury, there are other ways to do so. But granting an immunity from suit against Puerto Rican citizens to an otherwise unaccountable federal entity in the name of federalism, is not the way, especially not when we are dealing with injunctive relief and constitutioal rights, such as in the CPI case.